

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

SHELTON REVELLE

v.

DARBY BOROUGH POLICE OFFICER
TRIGG et al.

CIVIL ACTION
NO. 95-5885

M E M O R A N D U M

Broderick, J.

February 2, 1999

The instant action arises out of Plaintiff's 42 U.S.C. § 1983 civil rights complaint against several members of the Darby Borough Police Department ("the Department") alleging excessive use of force during his December, 1994 arrest. By Order dated January 19, 1999 this Court permitted Plaintiff to amend his complaint to add Darby Borough ("the Borough") as a defendant under a claim of municipal liability for engaging in a policy, practice or custom of acquiescence or deliberate indifference to the excessive use of force by its officers.

Currently before the Court are several discovery motions relating to Plaintiff's attempt to get records from the Delaware County District Attorney's Office ("the District Attorney") and the Department. First, Plaintiff filed a motion to compel the District Attorney to comply with a subpoena served by Plaintiff seeking records of complaints and investigatory files concerning the named Darby Borough Police Officers who are defendants in this action ("the Officer Defendants"). Before a response to

this motion was received, Plaintiff filed a motion to compel the Department to comply with a subpoena seeking records regarding the Officer Defendants as well as certain Department policies. In response, the Officer Defendants, through counsel who also represents the Borough and purports to represent the Department, filed a motion for a protective order seeking to prevent the disclosure of these documents. The Officer Defendants also filed a response to Plaintiff's motion to compel directed at the District Attorney. The District Attorney filed its own response to Plaintiff's motion to compel, purporting to object to the disclosure of these documents on the grounds of executive privilege. Finally, Plaintiff filed a consolidated reply regarding these pending motions. For the reasons stated below, the Court will grant in part and deny in part each of these motions.

I. Legal Standard

Defendants and the District Attorney, in both the responses to Plaintiff's motions and the motion for a protective order, object to the sought discovery on the grounds of relevance and privilege. Federal Rule of Civil Procedure 26(b)(1) provides, in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action The information sought need

not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, the federal rules have established a liberal system of discovery "meant to insure that no relevant fact remain[s] hidden." Crawford v. Dominic, 469 F. Supp. 260, 262 (E.D.Pa. 1979) (Pollak, J.).

In response to Plaintiff's motions, both the Chief of Police of Darby Borough, Robert Smythe ("Chief Smythe"), and the District Attorney of Delaware County, Patrick Meehan ("District Attorney Meehan" or "Mr. Meehan"), have filed nearly identical affidavits claiming "executive privilege" over some of the sought documents. The "government" or "executive" privilege is designed to "avoid the evils of 'government in a fishbowl.'" Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597 (E.D.Pa. 1980) (quoting Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913 (E.D.Pa. 1979)). The Third Circuit has made clear, however, that "[w]hen a request for relevant documents or information is made, a claim of privilege should be interposed judiciously and not casually." United States v. O'Neill, 619 F.2d 222, 225 (3d Cir. 1980). For that reason, the Court

carefully scrutinizes the manner of assertion of the privilege. See, e.g. O'Neill, 619 F.2d at 225 (rejecting manner in which privilege was asserted).

As an initial matter, the objection to production of documents on the ground of privilege should be made in writing. Id. Also, "'[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.'" Id. at 226 (quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953)). Finally, the claim of privilege must specify for what documents the privilege is being claimed as well as "precise and certain" reasons for non-disclosure of the documents. O'Neill, 619 F.2d at 226. In addition, Federal Rule of Civil Procedure 26(b)(5) provides, in relevant part: "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged ... the party shall make the claim expressly and shall describe the nature of the documents ... not produced ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Thus, a broad assertion of harm is clearly not enough. In fact, the Third Circuit has held that an "indiscriminate claim of privilege may in itself be sufficient reason to deny it." O'Neill, 619 F.2d at 227. Further, when the party against whom

discovery is sought seeks a protective order, that party must demonstrate that a particularized harm is likely to result from disclosure. See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

The privilege itself is a qualified one. Redland Soccer Club, Inc. v. Dept. of Army of United States, 55 F.3d 827, 854 (3d Cir. 1995) cert. denied, 116 S.Ct. 772 (1996). Once a claim of privilege has been properly asserted, the Court "itself must determine whether the circumstances are appropriate for a claim of privilege." O'Neill, 619 F.2d at 226 (quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953)). In a "civil rights action involving asserted official misconduct a claim that relevant evidence is privileged must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from unconstitutional action." Crawford, 469 F. Supp. at 262 (internal citation omitted). Then, if a valid claim of privilege is properly invoked, the "party who seeks the information must show the need for it" to allow the court to "'balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand.'" O'Neill, 619 F.2d at 227 (quoting Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979)); see also Redland Soccer Club, 55 F.3d at 854. The "privilege is designed only to protect documents whose

disclosure would so seriously hamper the operation of government that they should be kept secret notwithstanding their utility, or even indispensability, in establishing a litigant's claim."

Crawford, 469 F. Supp. at 264.

Documents which would deter citizens in making complaints or which would hamper ongoing criminal investigations are often protected from discovery, at least in an unredacted form, because of the threat disclosure of those documents poses to the investigation and prosecution of wrongdoing. See, e.g. Crawford, 469 F. Supp. at 264; Frankenhauser v. Rizzo, 59 F.R.D. 229, 244 (E.D.Pa. 1973) (Becker, J.) (listing ten factors to be weighed in determining whether Police Department documents should be disclosed). However, the mere bald assertion that discovery of the information will breach the confidence of police and citizens who have given information and deter future disclosures is not a sufficient basis for withholding discovery of relevant evidence. See, e.g. Crawford, 469 F. Supp. at 264; Frankenhauser, 59 F.R.D. at 244. By the same token, discovery of supervisory evaluations and other materials in police personnel files is often permitted, despite a concern that supervisors be allowed to discipline and evaluate their subordinates candidly, because these documents may, in many cases, be the best available evidence of the knowledge and state of mind of the supervisory officials. See, e.g. Crawford, 469 F. Supp. at 265.

II. The District Attorney's records

Plaintiff's subpoena to the District Attorney's office seeks the following:

Any and all notes, memoranda, correspondence, and other documents in your possession, custody, or control relating, referring, or pertaining to criminal complaints brought against Darby Borough Police Department officers Richard Galli, Richard Gibney, Joseph Trigg, Jonathan Regan, and Edward Silberstein, irrespective of whether the criminal complaint was a private criminal complaint, a criminal complaint brought by the Delaware County District Attorney's Officer, or a criminal complaint brought by any other State District Attorney's Officer or the United States Attorney's Office.

(Doc. 47 Ex. A). The District Attorney has produced some documents but has attempted to assert "executive privilege" over complaints which have been found lacking in prosecutorial merit. The District Attorney and the Officer Defendants have also objected to the disclosure of these materials on relevance grounds.

As an initial matter, the Court finds that the materials sought are discoverable, absent an applicable privilege, under Federal Rule of Civil Procedure 26(b)(1). The documents sought may be relevant to Plaintiff's claims of municipal liability. Prior complaints against these officers may be used to show that the Borough had knowledge of a pattern, if one existed, of use of excessive force by these officers. Although the Court offers no opinion on whether or not the sought documents would be admissible at trial, the Court finds that they are relevant and

reasonably calculated to lead to the discovery of admissible evidence.

The Court will deny the Motion for a Protective Order by the Officer Defendants as to these documents. The Officer Defendants do not have the right to raise the "executive privilege" as a basis for a protective order because the privilege belongs exclusively to the government. See United States v. Reynolds, 345 U.S. 1, 7-8 (1953); Cameron v. City of Philadelphia, Civ. A. No. 90-2928, 1990 WL 151770 at n. 9 (E.D.Pa. Oct. 4, 1990). The Officer Defendants have raised no other grounds for a protective order as to these materials.

However, since the District Attorney itself has sought to raise a privilege to prevent production of these documents, the Court must determine whether or not the privilege is applicable in this case. The District Attorney has asserted executive privilege, via affidavit and response to the plaintiff's motion, over documents described as "reports which upon investigation have been closed out for lack of prosecutorial merit." (Doc. 54 at ¶ 16). The asserted grounds for the privilege are that "discovery of the files being requested would hamper investigation in [the District Attorney's] office in that it would make potential witnesses unwilling to cooperate, for fear that their names and/or statements would be released to the public" and "releasing these files may hinder ongoing

investigations and open criminal cases being handled by [the District Attorney's] office." Meehan Aff. at ¶ 4-5.

The privilege has been properly asserted by the District Attorney in this case. However, the Court finds that the assertion of the privilege is overbroad. Executive privilege is "designed to protect only documents whose disclosure would so seriously hamper operations of government that they should be kept secret notwithstanding their utility in establishing the litigant's claim." Siegfried v. City of Easton, 146 F.R.D. 98, 101 (E.D.Pa. 1992). Non-disclosure of the sought documents in this case can only be justified by the need to protect the identities of complainants, protect the evaluative processes of the District Attorney's Office, and avoid interference with on-going criminal investigations. If the District Attorney is concerned that releasing the names of people who made complaints against the named officers for excessive use of force will chill the giving of information to the District Attorney's office in the future, the District Attorney may redact the sought records to remove the names and addresses of the complainants and other informants. The Court will also limit the required disclosure to those complaints where the allegations against the named officers center on the use of excessive force. Any other misconduct by the officers would not be relevant in this action and need not be disclosed. In order to protect the deliberative processes of the

District Attorney's office and any ongoing investigations, the Court will allow the District Attorney to redact evaluative summary from the complaints before they are disclosed and to withhold documents which relate to on-going criminal matters.

Therefore, Plaintiff's motion to compel compliance with the subpoena by the Delaware County District Attorney's Office is granted in part. The motion for a protective order filed by the Officer Defendants is denied as to these documents. The District Attorney shall produce all complaints and/or reports investigated and found to be lacking in prosecutorial merit which relate to allegations of use of excessive force by any one or more of the five named Officer Defendants. These records may be redacted to remove the name and address of any person who gave information regarding the investigation or the complaint and may also be redacted to remove any evaluative summary by the District Attorney's office. The District Attorney need not produce any complaints or reports the release of which would in any way interfere with a pending criminal investigation.

III. The Police Department Records

Plaintiff's subpoena to the Darby Borough Police Department seeks the following eight categories of documents which correspond to the numbered paragraphs in Exhibit A of Plaintiff's subpoena: 1) documents relating to the plaintiff

and his arrest, 2) personnel files for the Officer Defendants with specified personal information redacted, 3) documents regarding disciplinary actions concerning the Officer Defendants, 4) documents concerning allegations of use of excessive force by the Officer Defendants, 5) documents concerning criminal complaints against the Officer Defendants, 6) documents concerning investigations of the Officer Defendants, 7) documents concerning psychiatric evaluations of the Officer Defendants, and 8) documents regarding "conflict resolution, anger management, arrest procedures and protocol, and/or arrest report preparation.". (Doc. 50 Ex. A). In response to the subpoena, the Officer Defendants served objections asserting that the Department is a party to this action and therefore cannot be subpoenaed. (Doc. 50 Ex. B ¶ 2). This Court, by Order dated September 27, 1995, dismissed the Department as a defendant in this matter. Therefore, this objection is frivolous and need not be addressed. Defendants' objections also listed the following categories of documents as being "privileged or otherwise protected": officer personnel files (no. 2), criminal complaints against the officers (no. 5), investigations of the officers (no. 6), and psychiatric or psychological records (no. 7). (Doc. 50 Ex. B ¶ 1). Finally, the Officer Defendants, in their motion for a Protective Order, object to the discovery of all the categories of documents on relevance grounds.

The Court finds that all eight categories of materials, as limited by this Court below, are discoverable, absent an applicable privilege, under Federal Rule of Civil Procedure 26(b)(1). The documents in category 1 relate to Plaintiff's arrest and the incidents that form the basis of this action. They are clearly relevant to establishing Plaintiff's claims. The other categories of documents are directed at the police careers of the Officer Defendants or to the Borough's policies and practices. To the extent that they relate to the use of excessive force by the Officer Defendants or to the training practices of the Borough concerning the use of excessive force they are relevant to Plaintiff's claim of municipal liability. Although the Court offers no opinion on whether or not the sought documents would be admissible at trial, the Court finds that they are relevant and reasonably calculated to lead to the discovery of admissible evidence.

Having found that the requested documents are generally discoverable, the Court will deny in part the Motion for a Protective Order by the Officer Defendants as to categories of documents 1,3,4, and 8. As to categories of documents 2, 5, 6, and 7, the Officer Defendants also try to prevent disclosure on prejudice grounds. The Court will deny the Officer Defendants a protective order as to category 2 documents. The Court will grant in part the Officer Defendant's request for a protective

order as to categories 5, 6, and 7. While it is true that, under Federal Rule of Evidence 403, evidence which is relevant may not be admissible if the court determines that it is substantially more prejudicial than probative, that is an issue of admissibility not one of discoverability under the liberal Federal discovery rules. For that reason, the Court need not, at this time, address any arguments regarding prejudice which may be raised should any of the sought records be offered against the Officer Defendants at trial.

First, regarding the personnel files (category 2), the Court notes that discovery of personnel records and disciplinary files, absent the personal information that Plaintiff's subpoena directs the Department to remove from the personnel records, is routinely permitted in civil rights cases such as this one. See, e.g. Johnson v. City of Philadelphia, No. Civ. A. 94-1429, 1994 WL 612785 (E.D.Pa. Nov. 7, 1994) (personnel files); Cameron v. City of Philadelphia, Civ. A. No. 90-2928, 1990 WL 151770 (E.D.Pa. Oct. 4, 1990) (disciplinary records); Scouler v. Craig, 116 F.R.D. 494 (D.N.J. 1987) (personnel files); Crawford v. Dominic, 469 F. Supp. 260 (E.D.Pa. 1979) (Pollak, J.) (disciplinary records). The materials in the file may be relevant to show, among other things, Borough policies regarding hiring and training of officers. The Officer Defendants have offered no other specific reason why this material is not discoverable.

Therefore, the Court will order discovery of these records, as redacted pursuant to the Plaintiff's subpoena.

Similarly, the Court finds that there is no undue prejudice in compelling the disclosure of criminal complaints or investigations of the officers (categories 5 and 6). These materials are relevant to establishing Plaintiff's claim for municipal liability and their admissibility at trial against these defendants is not being decided here. The Court will, however, limit the disclosed materials to those which relate to allegations of use of excessive force by the named Officer Defendants.

The Court next addresses Plaintiff's request for psychiatric evaluations of the Officer Defendants, if any, which are in the control of the Department (category 7). The Supreme Court of the United States has recognized that a psychotherapy privilege applies in federal civil rights action. Jaffee v. Redmond, 518 U.S. 1 (1996). The Court has applied this privilege to communications with psychiatrists, psychologists, and social workers. Id. at 15. However, this privilege is not absolute because it does not cover all communications with those persons and, just like other testimonial privileges, it can be waived. Id. at 15 n.14. Jaffee does not provide that all records in the hands of a third party cannot be disclosed by that party. Instead, Jaffee holds that "confidential communications between a

licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure" Id. at 15. The focus in Jaffe is on protecting the sanctity of the treatment relationship. An evaluation that was prepared for the purpose of employment with the expectation that this evaluation would be delivered to the employer is not confidential communication between the therapist and the patient and is, therefore, not protected by the psychotherapist-patient privilege. See, e.g. Siegfried v. City of Easton, 146 F.R.D. 98, 101 (E.D.Pa. 1992). Therefore, the Court will order disclosure only of evaluations which were made for employment, rather than counseling or treatment purposes. The Court will permit these records, if they exist, to be disclosed in camera, if a timely request is made.

The Department has not filed with this Court a response either to Plaintiff's subpoena or Plaintiff's motion to compel. Attached to the Motion for a Protective Order filed by the Officer Defendants, however, is an affidavit by Chief Smythe which asserts executive privilege over "files concerning complaints brought against five Darby Borough police officers." Smythe Aff. at ¶ 2, 3. Chief Smythe asserts the privilege on the grounds that "discovery of the files being requested would hamper investigation by my office in that it would make potential witnesses unwilling to cooperate, for fear that their names

and/or statements would be released to the public" and "releasing these files may hinder the efforts of the Police Department to fairly evaluate and discipline its officers." Smythe Aff. at ¶ 4-5. From the text of Chief Smythe's affidavit, even read broadly, it appears that he is only asserting privilege over documents in categories 4, 5, and 6 of Plaintiff's subpoena.

The Court finds that the privilege as to those documents has not been properly asserted and that the attempted assertion of the privilege is overbroad. The assertion of privilege here was made in writing by the appropriate agency head. However, Chief Smythe's unsworn affidavit fails to in any way allege that he has examined the requested materials and found them to be privileged. The Third Circuit has stressed that personal, careful examination of the records by the department head must precede an invocation of the privilege. See United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980).

In addition, the assertion of privilege by Chief Smythe is a sweeping one which refers only to "complaints against the officers." Not only does Chief Smythe not specify what types of complaints these are, he does not explain why the harm he alleges is likely to occur from release of those "complaints." The same reasons this Court found Mr. Meehan's sweeping attempt at invoking privilege too broad justify denying the assertion of privilege here as well. Non-disclosure of the sought documents

in this case can only be justified by the need to protect the identities of complainants, protect the evaluative processes of the Police Department, and avoid interference with on-going police investigations. If the Department is concerned that releasing the names of people who made complaints against the named officers for excessive use of force will chill the giving of information to the Department in the future, the Department may redact the complaints to remove the names and addresses of the complainants and other informants. The Court will also limit the required disclosure to those complaints, both civil and criminal, and investigations where the allegations against the named officers center on the use of excessive force. Any other misconduct by the officers would not be relevant in this action. In order to protect the deliberative processes of the Department and any ongoing investigations, the Court will allow the Department to redact evaluative summary from the documents before they are disclosed and to withhold documents which relate to on-going criminal investigations.

Therefore, Plaintiff's motion to compel compliance with the subpoena by the Police Department is granted in part. The motion for a protective order filed by the Officer Defendants is denied in part. The Police Department shall produce all the sought documents in categories 1, 2, 3, and 8 of Plaintiff's subpoena, redacted as specified in the subpoena. The Department shall

produce all documents in categories 4,5, and 6 of Plaintiff's subpoena which relate to allegations of the use of excessive force by any one or more of the five named Officer Defendants. These records may be redacted to remove the name and address of any person who gave information regarding the investigation or the complaint and may also be redacted to remove any evaluative summary by the Department. The Department need not produce any complaints or reports the release of which would in any way interfere with a pending criminal investigation.

The Department shall produce only those psychiatric or psychological evaluations of the named Officer Defendants which are in the Department's control and which were created for employment, rather than counseling or treatment purposes. The Officer Defendants may, within 10 days, request in camera review of these documents. If in camera review is timely sought, the Court will disclose to Plaintiff only those portions of the evaluations, if any, which tend to show that one or more of the named Officer Defendants had been evaluated as having a condition which might on occasion make him prone to the use of violence.

An appropriate Order follows.

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ORDER

AND NOW, this 2nd day of February, 1999; Plaintiff having filed a motion to compel compliance with a subpoena by the Delaware County District Attorney's Office ("the District Attorney"); Plaintiff having also filed a motion to compel compliance with a subpoena by the Darby Borough Police Department

("the Department"); the Defendant Darby Borough Police Officers ("the Officer Defendants") having filed a motion for a protective order seeking to block compliance with both subpoenas; in consideration of those motions and the responses thereto; for the reasons stated in this Court's Memorandum of February 2, 1999;

IT IS ORDERED that Plaintiff's motion to compel compliance with the subpoena by the District Attorney (Document No. 47) is **GRANTED IN PART and DENIED IN PART** as hereinafter set forth;

IT IS FURTHER ORDERED that the District Attorney shall produce, within 10 days, all complaints or reports investigated and found to be lacking in prosecutorial merit which related to allegations of use of excessive force by any one or more of the five named Officer Defendants. These documents may be redacted to remove the names and addresses of persons who provided information and any evaluative summary by the District Attorney's office. The District Attorney need not produce any complaints or reports the release of which would in any way interfere with a pending criminal investigation;

IT IS FURTHER ORDERED that Plaintiff's motion to compel compliance with the subpoena by the Department (Document No. 50) is **GRANTED IN PART and DENIED IN PART** as hereinafter set forth;

IT IS FURTHER ORDERED that the Department shall produce, within 10 days, all documents in categories 1, 2, 3 and 8 of Plaintiff's subpoena;

IT IS FURTHER ORDERED that the Department shall produce, within 10 days, all documents in categories 4, 5, and 6 of

Plaintiff's subpoena which relate to allegations of the use of excessive force by any one or more of the five named Officer Defendants. These records may be redacted to remove the names and addresses of persons who provided information and any evaluative summary by the Department. The Department need not produce any complaints or reports the release of which would in any way interfere with a pending criminal investigation;

IT IS FURTHER ORDERED that the Department shall produce, within 10 days, in response to category 7 of Plaintiff's subpoena, only those psychiatric or psychological evaluations of the named Officer Defendants which are in the Department's custody or control and which were performed for employment, rather than counseling or treatment purposes. Any officer effected by this disclosure may, within 10 days of this Order and before disclosure is made, request in camera review of these documents. If in camera review is timely sought, the Court will examine the documents and disclose to Plaintiff only those portions of the evaluations, if any, which tend to show that one or more of the named Officer Defendants had been evaluated as having a condition which might on occasion make him prone to the use of violence;

IT IS FURTHER ORDERED that Defendants' Motion for a Protective Order (Document No. 51) is **GRANTED IN PART and DENIED IN PART** as heretofore set forth.

RAYMOND J. BRODERICK, J.